No. 88-309 (9)

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING
Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

AMICI CURIAE BRIEF OF THE COUNTY OF CHAVES, THE COUNTY OF LINCOLN, THE CITY OF ROSWELL, THE VILLAGE OF RUIDOSO DOWNS, AND TWENTY-TWO COMMUNITY ACEQUIAS, ALL WITHIN THE STATE OF NEW MEXICO

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March 9, 1989

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Community acequias or community ditches are bodies corporate, statutorily designated as political subdivisions of the State of New Mexico, organized to administer and govern the distribution of surface water. *See* §§ 73-2-11 and 73-2-28 N.M.S.A. (1985 Repl.). The additional *amici curiae* are:

Rio Bonito

- Government Springs Ditch
- Providencia Ditch
- Cruz de Jara Ditch
- Lincoln Ditch

Rio Ruidoso

- Hale Ditch South
- Bracken Ditch
- Hewett Ditch
- Barragan & West Ditch
- Ambrocio Chavez Ditch #1
- Lower Chosas Ditch
- Acequia de Mes
- Ambrocio Chavez Ditch (lower)
- F. Sanchez Ditch #2
- Hale Ditch North
- Maxwell Ditch
- L. Gallegos Ditch
- Analla & Barragan Ditch
- Chosas Ditch South
- San Patricio Ditch
- Storm Ditch
- Pablo Chavez Ditch

Rio Hondo

- Picacho Ditch

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, may a reserved water right be implied for all practicably irrigable lands within a reservation set aside for a specific tribe?

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INTEREST OF AMICI CURIAE

The *amici curiae* are essentially all of the counties, municipalities, and community acequias involved in *State of New Mexico ex rel. S. E. Reynolds v. Lewis*, Chaves County Nos. 20294 and 22600, Consolidated, a statutory water rights adjudication of the interrelated rights to the use of the waters of the Rio Hondo, the Rio Ruidoso, and the Rio Bonito in southeastern New Mexico. Along with approximately 600 individual water users in the stream system, the *amici* are parties defendant whose water rights will be determined *inter sese*, as against the federal reserved rights of the United States on behalf of the Mescalero Apache Tribe. The *amici* and their defendant constituents, as opposed to

the State of New Mexico, are the real parties in interest in *Lewis*.[1]

The property rights of the *amici curiae* will necessarily be affected by the Court's resolution of the question presented because the Court will settle the underlying issues of the applicability of practicably irrigable acreage as a standard of quantification and the conflict between the intent to imply a federal reserved water right in the face of express congressional or executive action to the contrary. With respect to both issues, the *amici curiae* support the State of Wyoming.[2]

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[1]The State of New Mexico prosecutes statutory adjudications in its governmental capacity, usually as the party plaintiff, to facilitate the administration of water rights. *See* §§ 72-4-15, *et seq.* N.M.S.A. (1985 Repl.). The state does not represent the interests of the water users *parens patriae*, but is normally postured as an adversary. *Cf.* Brief of the State of New Mexico as Amicus Curiae, at 2, n.1.

[2]Notwithstanding analogous facts and the court's conclusion in *Lewis* that "[w]hen there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied," the State of New Mexico does not treat the conflict between expressed and implied intent in its brief as *amicus curiae*. *Cf.* Brief for the Petitioner at 17-21.

With respect to the first issue, the State of Wyoming notes that:

> [T]he Indians inevitably will point out that the primary agricultural purpose of the reservation is now outmoded, *i.e.*, that it may be impossible to generate a moderate living for its Indian residents based solely on agriculture.

Brief for the Petitioner at 16. Wyoming concludes that "relief from [this] situation is appropriately sought from the Congress or the Executive, whichever established the reservations for agricultural purposes." *Id.* at 49. The State of New Mexico however, urges that the Court take it upon itself to quantify federal reserved rights based on modern day purposes instead of the purposes for which a reservation was withdrawn. *See* Brief of the State of New Mexico as Amicus Curiae at 11. Contrary to Rule 36.2, New Mexico does not identify the party it supports as *amicus curiae*.

SUMMARY OF ARGUMENT

The standard of practicably irrigable acreage used to quantify federal reserved water rights for Indians has been equated with the economic feasibility of a proposed Indian irrigation project. As such, the "proof" of an Indian right in recent cases has consisted of a benefit-cost analysis of a given proposed project. Benefit-cost analysis is the public sector counterpart to the financial feasibility tests customarily performed by private sector investors prior to undertaking long-term capital investments. The function of benefit-cost analysis is to assess the social return on public expenditures.

In recent litigation over federal reserved rights, benefit-cost analysis has been taken out of context and used as a device to justify competing entitlements to property, *i.e.*, water rights. When used as a tool of advocacy, benefit-cost analysis becomes contrived. Typically, the United States manufactures idealized projects and skews each of the elements of the analysis in order to arrive at a favorable benefit-cost ratio. It is common knowledge that these projects will never be constructed. As a consequence, they represent nothing more than a pretext to create large paper water rights as a form of wealth. The object is to sell or lease the rights, which belies any implicit need for water to satisfy the purposes for which an agricultural reservation was withdrawn from the public domain.

Additionally, the Winters Doctrine is a doctrine of contemporaneous intent and implicit need. The doctrine insures that the purposes for which federal lands are reserved will not fail absent an explicit reservation of necessary water. While the historic facts surrounding the withdrawal of lands from the public domain for the creation of Indian reservations may differ, it is not logically possible to imply a need for a federal reserved right in the face of an express intention to the contrary.

ARGUMENT

POINT I: PRACTICABLY IRRIGABLE ACREAGE OR BENEFIT-COST ANALYSIS HAS PROVEN TO BE UNSUITED TO THE ESTABLISHMENT OF A PROPERTY RIGHT THROUGH LITIGATION

The standard of practicably irrigable acreage was promulgated in *Arizona v. California*, 373 U.S. 546 (1963). The Court's Special Master concluded that the United States intended to reserve Colorado River water for five Indian reservations when the reservation lands were withdrawn from the public domain. Report of Special Master Simon H. Rifkind at 259-260, December 5, 1960. The Master concluded that the reservation of water "was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the reservation was created," but that "enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian reservation." *Id.* at 260.

The Special Master settled on the standard of practicably irrigable acreage to quantify the Indians' water rights:

> I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses.

Id. at 262. The standard served the objectives of enabling the quantification of the rights notwithstanding population growth and of establishing water rights of fixed magnitude and priority to provide certainty for all water users. *Id.* at 265.

When *Arizona v. California* was reopened, the Master pointed out that "no standard [of quantification] is definitive for all cases" and that practicably irrigable acreage has not been adopted as "the universal measure of Indian reserved water rights . . .." Report of Special Master Elbert

Tuttle at 87-90, February 22, 1982. Nonetheless, the Court understandably refused to relitigate its previous adoption of the standard in order to preserve the certainty established in 1963 with respect to the Colorado River Indians.[3] *Arizona v. California*, 460 U.S. 605, 625 (1983).

The standard of practicably irrigable acreage has been equated with the economic feasibility of proposed agricultural projects for Indians. Report of Special Master, February 22, 1982, *Arizona v. California*, 460 U.S. 605 (1983). The Master concluded that "a finding that annual benefits exceed costs will suffice for a finding of practicable irrigability." *Id.* at 100. *See e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied, Oregon v. United States*, 467 U.S. 1252 (1984). Accordingly, the "proof" of a reserved right for an Indian reservation withdrawn for agricultural purposes usually consists of a benefit-cost analysis of one or more proposed irrigation projects.

The current confusion over the quantification of reserved rights for agricultural reservations comes from two sources, *viz.*, the Court's holding that federal reserved water rights are limited to need in *Cappaert v. United States*, 426 U.S. 128,

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[3]On the basis of practicably irrigable acreage, the Master recommended, and the Court adopted, an award of 905,496 acre feet annually to the five Colorado River reservations having a combined population of 2,940 Indians. *See* Report of Special Master Simon H. Rifkind at 350-51 and 85-88. According to the United States Census, the estimated contemporaneous population of the Colorado River Basin states — Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming — was 23,658,000 people. 1960 Census Population, Vol. I, Part 1, Estimates of Total Resident Population of States and Puerto Rico, July 1, 1963, Table 1.

The remainder of the average annual flow of the Colorado River of 13,500,000 acre feet, *i.e.*, 12,594,504 acre feet, was apportioned to the basin states. On a per capita basis, the use of practicably irrigable acreage as the standard of quantification was 579 times more favorable to the Indians than the nonIndians. Today, the ratio is much more exaggerated.

See Appendix A for the potential application of the standard.

142 (1976) and *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978), and the consternation of Interior and Justice Department attorneys over the prospect that reserved water rights were not as broad and unlimited as had been hoped.[4] The result has been an attempt to distinguish between Indian reserved rights and nonIndian reserved rights, coupled with the attribution of the doctrinal limitations only to the latter. At the same time, the Indian advocates began to assert that the purpose of any Indian reservation was to create "a permanent homeland," a concept designed to overcome the limitation to a need to satisfy the specific purposes of a given reservation.[5]

Since *Cappaert* and *New Mexico* in 1976 and 1978, the Indian reaction to the Court's continuing and consistent definition of the reservation doctrine has also led to a change in the manner in which the United States approaches the proof of economic feasibility. When the Court adopted benefit-cost analysis as a standard of quantification in 1963, it did so on the basis of traditional methodological precepts. Since then the United States has altered the economic approach that was used in 1963 by adjusting

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[4]The holdings in *Cappaert* and *New Mexico* do not differ from the Court's conclusion in *Winters v. United States*, 207 U.S. 564 (1908). There, the Ft. Belknap Reservation was awarded the water needed to irrigate the existing 5,000 acre Indian irrigation project that precipitated the lawsuit. The Ninth Circuit noted that the Ft. Belknap Reservation had approximately 30,000 practicably irrigable acres. 143 Fed. 740 (9th Cir. 1906). The change came in *Arizona v. California* in 1963.

[5]While not disputing that an Indian reservation may have been created as a permanent homeland, albeit that the contemporaneous policy was one of assimilation, such a concept is not useful to explicate the object to be attained in reserving water for a particular purpose. Under the Winters Doctrine, in other words, the purposes must be specific enough to determine by rational inference a certain need for water. Otherwise, the doctrine is nothing more than a black hole in the 5th Amendment, *i.e.*, a legal fiction designed to facilitate taking without compensation. *See* Brief for the State of New Mexico, *United States v. New Mexico*, No. 77-510 at 10-18.

benefit-cost analysis with a social and ethical bias deemed necessary to compensate for the government's past injustices to Indians.[6] The result in litigation has been more than the assertion of unorthodox benefit-cost analyses by the United States and the tribes. The benefit-cost analyses have become charades to procreate excessive and unnecessary water rights. While continuing to articulate their claims in the vernacular of benefit-cost analysis, the United States and the Indians have invalidated the concept of practicably irrigable acreage by thoroughly distorting its analytic elements.

With the increase in Indian water right litigation, benefit-cost analysis has gradually become a means to justify the end, namely to make an idealized project economically feasible in order to maximize the potential entitlement to water. The analysis, however, was never intended to be utilized in resolving competing entitlements to property or water rights. When used as a tool to advocate a legal theory, particularly when championing Indian water rights, benfit-cost analysis is transformed from an objective analytical tool to a self-serving and purely argumentative form of assessment. The result is that the United States maintains that Indians should get special treatment in a benefit-cost analysis of any of its proposed water projects. For example, the United States and the tribes typically claim the benefits from products moved off the reservation in a local region, but refuse to consider the costs that accrue beyond the reservation boundary. Similarly, instead of considering a reasonable discount or interest rate, the United States and

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[6]The witnesses used by the United States, who appear on the same side in adjudications all over the West, admit that they modify their benefit-cost analyses with social considerations in order to produce a favorable benefit-cost ratio in circumstances where the project in question would be patently infeasible if it were being contemplated for nonIndian use. *See, e.g.*, H. S. Burness, R. G. Cummings, W. D. Gorman, and R. R. Lansford, "Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting," 23 Nat. Res. J. 289 (1983).

the tribes believe that they are entitled to rely on an unquestionably low cost of money. Knowing that the projects will never be constructed, however, it is only the language — and not the substance — of benefit-cost analysis that is useful to the Indians.

No special rules should apply to the economic feasibility of a proposed Indian project. For any public investment, all beneficiaries and all adversely affected parties should have their interests represented and measured in economic terms. The purpose of benefit-cost analysis is to calculate all benefits and costs and compute the ratio between the two, not to maximize the present value of net benefit by giving special treatment to one group of people.

The use of benefit-cost analysis as "proof" of a reserved water right has also led to the manufacture of Indian claims in the Justice Department with little or no input from the Indian tribes. The purpose is to create an artifice through which to maximize the water "needed" for the reservations. Neither the Justice Department attorneys nor the Indians, however, believe that these projects will ever be built. The projects are designed to create a paper water right that can be leased to the nonIndians who, in direct proportion to the extent the Indians perfect their paper rights, would witness the defeasance of their own rights.[7] *Cf. United States v. New Mexico*, 438 U.S. 696, 699, 715 (1978); *see also* Brief for the Petitioner at 32-33. In words attributed to Wendell Chino, the Chairman of the Mescalero Apache Tribe, 'it's about time [the nonIndians] started to pay for our water.'

The fundamental problem with the use of practicably irrigable acreage or benefit-cost analysis to quantify federal reserved rights for Indians was summed up by Dr. Robert

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[7]Contrary to the assertions of the United States and the tribes, the Winters Doctrine does not mean that when the United States reserves land from the public domain for a specific federal purpose, it must have intended to implicitly reserve all of the money needed to satisfy the purposes for which the land was withdrawn.

Young, one of the nation's foremost agricultural economists, in his testimony in the *Lewis* case: When used to create a property right or entitlement to water, especially in fully appropriated stream systems, the analysis will necessarily be biased and distorted. Transcript of Proceedings, December 1, 1987, *State of New Mexico ex rel. S. E. Reynolds v. Lewis et al.*, Chaves County Nos. 20294 and 22600, Consolidated, Vol. III at 1107-1157. He concluded his testimony by stating that while benefit-cost analysis "might have applied to some of the earlier, less difficult cases . . . we need to find some other mechanism for resolving these conflicts." *Id.* at 1157.

POINT II: AN INTENT TO RESERVE A WATER RIGHT CANNOT BE IMPLIED WHEN THE UNITED STATES EXPRESSES AN INTENT TO THE CONTRARY

In this case, President Roosevelt authorized the construction of the Shoshone Reclamation Project just north of the Reservation. A year later, the United States Congress passed legislation enabling the Shoshone to acquire water rights for the irrigation of additional lands under Wyoming law, appropriating funds, and facilitating the development of canals and reservoirs and the improvement of arable lands. Act of March 3, 1905, 33 Stat. 1016. Notwithstanding the expressed intent of Congress to create water rights for the Shoshone under state law, the Wyoming Supreme Court implied an intent to federally reserve a water right to supply approximately 70% of the same reservation lands. *See* Brief for the Petitioner at 5.

A similar conflict between the government's expressed intent and an implied intent appears in the *Lewis* case.[8] With

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[8]In its Summary of Argument, Wyoming states that:

> The question before the court concerns the appropriate standard of quantification of the implied federal reserved water right for agricultural Indian reservations, typically set aside during the nine-

respect to the creation of the Mescalero Apache Reservation, the court found that:

> The first Executive Order of May 29, 1873, withdrew land from the public domain for the purpose of providing arable land and grazing lands for a Mescalero Apache Reservation. When the reservation boundaries wre originally designated in 1873, there was a specific intent on the part of federal officials to protect the agricultural economy and water supply of non-Indian farmers who settled the arable lands among the Rio Ruidoso valleys prior to 1873. In 1873, the Rio Bonito, Rio Hondo and Rio Ruidoso valleys were occupied by settlers. These lands and the appurtenant water appropriated by those settlers were not available for a reservation. In response to these Indian/non-Indian land use conflicts, all of the irrigated lands along Rio Ruidoso were expressly excluded from the 1873 Executive Order reservation.

Decision of the Court, January 25, 1989, Finding No. 7. *See* Appendix B. The court found further that:

> On February 8, 1874, an Executive Order withdrew land from the public domain for the purpose of adding arable land and grazing land to the reservation. All of the arable lands along the Rio Ruidoso were excluded from the reservation by the 1874 Executive Order to protect the agricultural economy and water supply of non-Indian farmers who had settled the arable land along the Rio Ruidoso prior to 1873.

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teenth century, well before significant irrigation water rights were obtained from the states by non-Indian settlers in the West.

Brief for the Petitioner at 11. It should be noted that this was not always true. In *Lewis*, for example, the stream system in question was fully appropriated by nonIndian settlers *before* the Mescalero Reservation was created.

Id., Finding No. 9. *See* Appendix C.[9]

Despite the expressed intent of the government, the United States asserted in *Lewis* that the Mescalero had an implied right to the waters of the Rio Ruidoso to irrigate all of the practicably irrigable acreage for the proposed Rinconada Project, located on the opposite side of Sierra Blanca, a mountain rising to 12,003 feet.[10] Considering the facts in *Lewis*, the Court concluded that "[w]hen there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied." While it would not seem possible to reason to a different conclusion, the Wyoming Supreme Court has done so in this case.

CONCLUSION

Two conclusions emerge.

First, although litigation over federal reserved water rights has shown that each case has its own character, there is a striking similarity between the Wind River Reservation in Wyoming and the Mescalero Apache Reservation in New Mexico. In both instances, the necessity for a federal reserved water right was eliminated in part. For the Wind River Reservation, Congress expressly provided for state water rights to be obtained for the Indians. For the Mescalero Reservation, non-Indian arable and irrigable lands along the Rio Ruidoso were expressly carved out of the

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[9]The evidence in *Lewis* also showed that the area excluded was widened considerably past the foothills bordering the Ruidoso Valley in order to prevent depradations. *Comp.* Appendix C with Appendix B.

[10]A benefit-cost analysis was done for the proposed project, including a reconnaissance level study of the transmountain diversion facilities, estimated to cost $45,638,250.00. The United States also sought a reserved right for practicably irrigable acreage in the amount of 17,941.7 acre feet annually from any of its proposed points of diversion. The average annual flow of the Rio Ruidoso at the reservation boundary, just above the nonIndian community, is 9,620 acre feet.

withdrawal of public lands, while other sources of supply from which a right could be implied were made a part of the reservation. Though differing historic facts surround the creation of all Indian reservations, it must be remembered that a reserved water right was not necessarily intended in all circumstances. In some instances, there are withdrawals of land from the public domain, such as those for the Mescalero and Wind River reservations, for which history must be rewritten in order for a reserved water right to be created by implication.

Secondly, as long as a practicably irrigable acreage or benefit-cost analysis forms the "proof" of a reserved right for Indians, it will be abused and distorted. When used to assert a property right, the analysis becomes contrived as a matter of course.

Consequently, the Court should adopt a standard of quantification tailored to a demonstration of the needs associated with the contemporaneous purposes for which Indian reservations were created.

Respectfully submitted,

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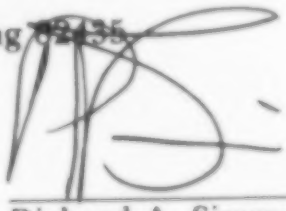

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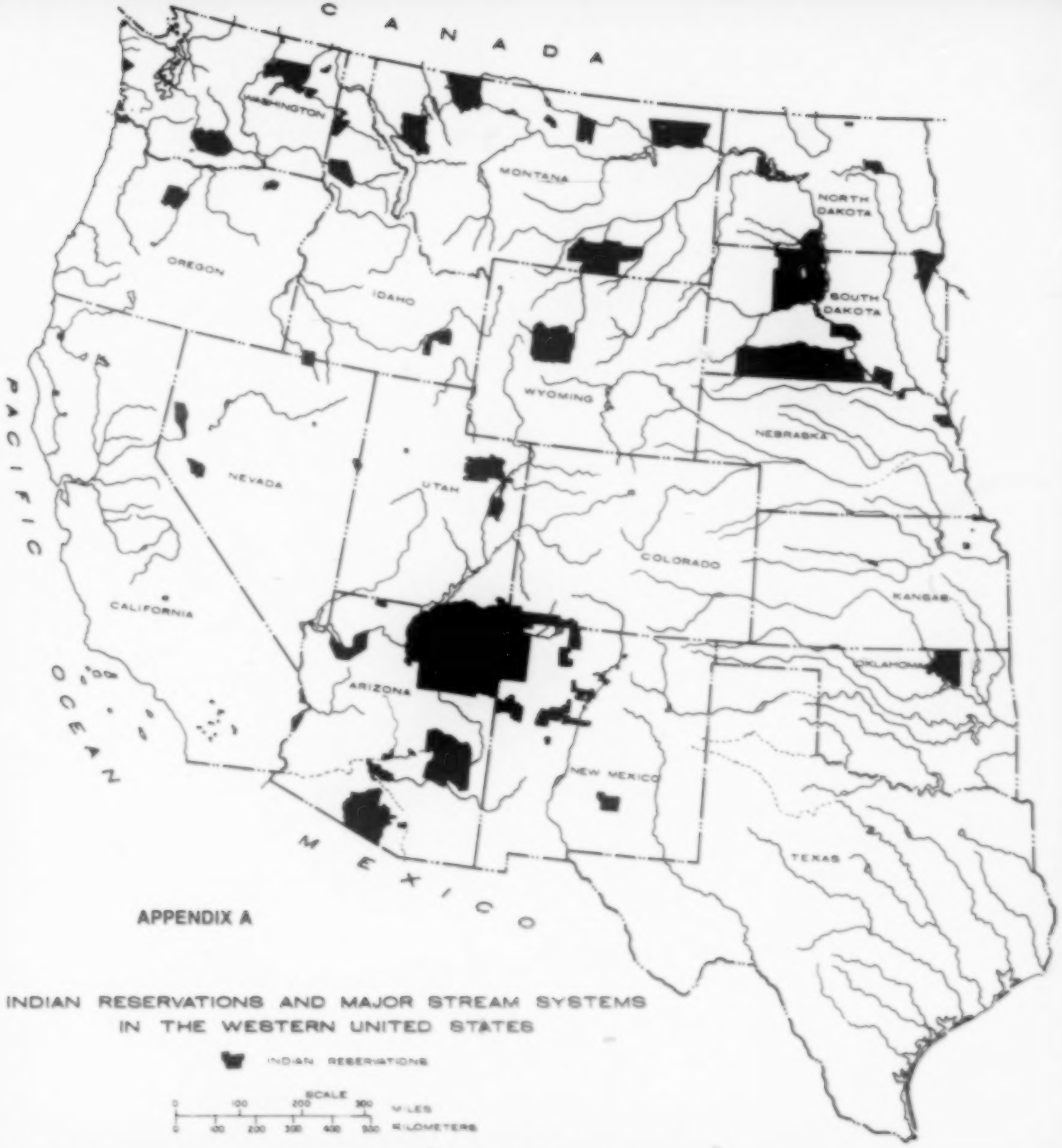
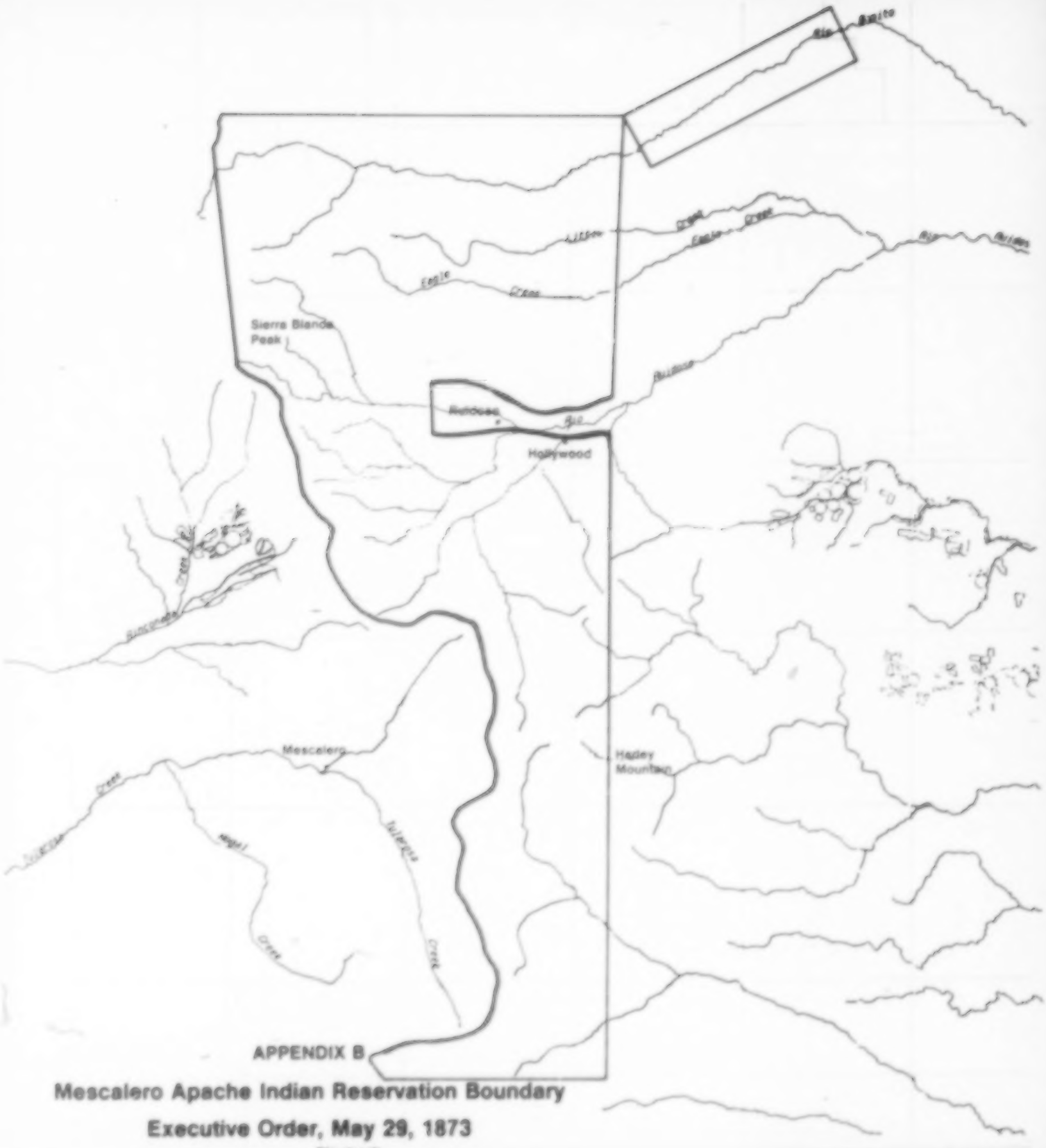


APPENDIX A

INDIAN RESERVATIONS AND MAJOR STREAM SYSTEMS IN THE WESTERN UNITED STATES

Prepared by New Mexico Water Resources Division from National Atlas, Federal Lands (sheet no. 272) compiled by U.S.G.S., 1968.

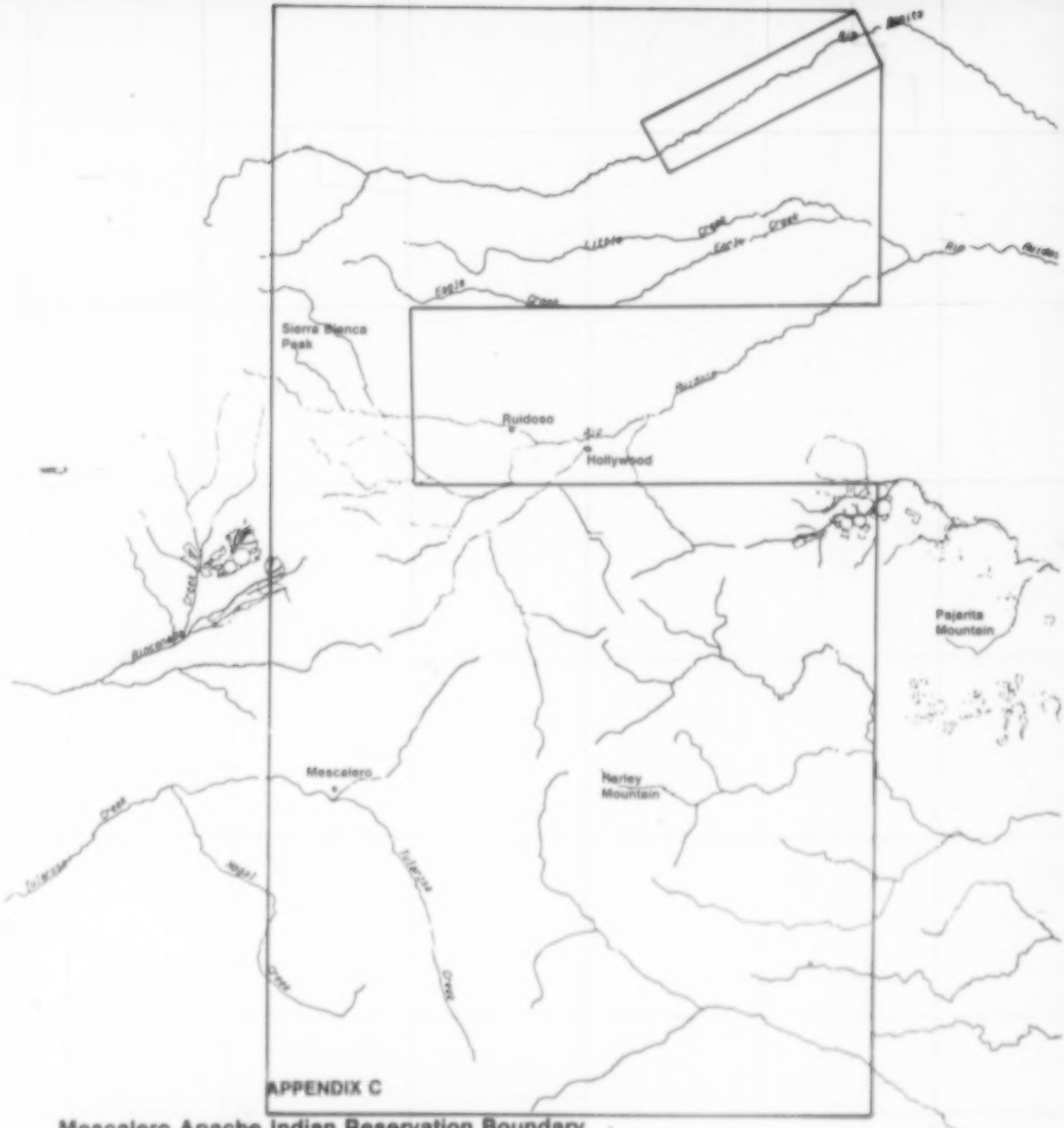


APPENDIX B

Mescalero Apache Indian Reservation Boundary

Executive Order, May 29, 1873

Cloudcroft



APPENDIX C

Mescalero Apache Indian Reservation Boundary

Executive Order, February 8, 1874

Cloudcroft